No. 07-1265

In the Supreme Court of the United States

WAYNE LEE PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
VIJAY SHANKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether courts may consider an incompetent defendant's statutory maximum sentence when determining whether the defendant faces "serious criminal charges," *Sell* v. *United States*, 539 U.S. 166, 179 (2003), that would warrant involuntary medication to restore competence.

2. Whether petitioner's charged offenses—making a false statement in connection with the acquisition of a firearm, and illegally possessing a firearm—were "serious."

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Gall v. *United States*, 128 S. Ct. 586 (2007) 9
Irizarry v. *United States*, No. 06-7517 (June 12, 2008), slip op. 9
Sell v. *United States*, 539 U.S. 166 (2003) 4, 5, 6, 8, 9, 11
United States v. *Booker*, 543 U.S. 220 (2005) 10
United States v. *Evans*, 404 F.3d 227 (4th Cir. 2005) ... 7, 8
United States v. *Gomes*, 387 F.3d 157 (2d Cir. 2004), cert. denied, 543 U.S. 1128 (2005) 9
United States v. *Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008) 7, 8
United States v. *Valenzuela-Puentes*, 479 F.3d 1220 (10th Cir. 2007) 8

Statutes:

18 U.S.C. 115(a)(1)(B) 2
18 U.S.C. 922(a)(6) 1, 3
18 U.S.C. 922(g)(4) 2, 3
18 U.S.C. 924(a)(2) 10
18 U.S.C. 4246 2

In the Supreme Court of the United States

No. 07-1265

WAYNE LEE PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 40-49) is reported at 507 F.3d 300.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2007. A petition for rehearing was denied on November 27, 2007 (Pet. App. 50-51). The petition for a writ of certiorari was filed on February 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Middle District of Louisiana on one count of making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6),

and one count of possessing a firearm and ammunition as a person who has been adjudicated as a mental defective or who has been committed to a mental institution, in violation of 18 U.S.C. 922(g)(4). Pet. App. 2-4. The district court granted the government's motion to involuntarily medicate petitioner to restore his competency to stand trial. The court of appeals affirmed. *Id.* at 40-49.

1. On October 16, 2003, petitioner entered the Clerk's office at the Middle District of Louisiana in Baton Rouge and demanded to know why a pro se lawsuit he had filed had been dismissed. Petitioner became irate, and court security was called to intervene. As he left the building, petitioner pointed at a Court Security Officer and said, "I am going to kill you. Do you hear me? I am going to kill you." When federal authorities went to petitioner's home to arrest him, he resisted arrest and had to be subdued; a handgun was found in his pocket. Pet. App. 41; Gov't C.A. Br. 4-5.

Petitioner was indicted on one count of threatening to murder a federal official, in violation of 18 U.S.C. 115(a)(1)(B). He was subsequently deemed incompetent to stand trial and was referred to Butner Federal Medical Center (FMC) in Butner, North Carolina, for a mental-health evaluation. Dr. Angela Walden-Weaver and Dr. Robert Lucking examined petitioner and concluded that he suffered from a delusional disorder. Petitioner was then referred for an evaluation to determine whether he was eligible for civil commitment under 18 U.S.C. 4246. During that evaluation, petitioner stated that he had no interest in acquiring another weapon. Based in part on that statement, the clinicians found that petitioner's release would not create a substantial risk of bodily injury to another person or serious dam-

age to the property of others. On November 19, 2004, the indictment against petitioner was dismissed. Pet. App. 41-42; Gov't C.A. Br. 5-7.

Less than a month later, petitioner bought a firearm from a pawn shop. On the form accompanying the purchase, he falsely answered "no" to the question whether he had ever been adjudicated mentally incompetent or committed to a mental institution. Pet. App. 42; Gov't C.A. Br. 7.

On May 12, 2005, the Louisiana State University Law School in Baton Rouge was hosting a Federal Bar Association seminar. Many federal judges from the Middle District of Louisiana and neighboring districts were expected to attend, and United States Marshals were assigned to provide security for the judges. While securing the school's parking lot, the marshals found petitioner sitting in the driver's seat of a vehicle. The marshals observed a gun on the front passenger seat, and they drew their weapons and ordered petitioner out of the car. Instead of complying, petitioner began driving away, and the marshals pursued and apprehended him. After they placed him under arrest, the marshals searched petitioner's vehicle, finding a firearm, a box of ammunition, and a loaded magazine. Pet. App. 42; Gov't C.A. Br. 7-9.

2. a. A grand jury in the United States District Court for the Middle District of Louisiana charged petitioner with making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6), and possessing a firearm and ammunition as a person who has been adjudicated as a mental defective or who has been committed to a mental institution, in violation of 18 U.S.C. 922(g)(4). Pet. App. 2-5.

b. Petitioner filed a motion to determine competency, and the district court appointed Dr. John Thompson, Jr., to examine him. Dr. Thompson diagnosed petitioner with a form of schizophrenia and determined that petitioner was incompetent to stand trial because he did not have a complete awareness of the charges against him and did not appreciate their seriousness. The district court then remanded petitioner to the custody of the Attorney General for an evaluation at Butler FMC. Petitioner was once again examined by Drs. Walden-Weaver and Lucking, who also diagnosed him with a form of schizophrenia and recommended involuntary medication to render him competent to stand trial. Pet. App. 43-44; Gov't C.A. Br. 9-11.

The government moved to involuntarily medicate petitioner to restore his competency for trial. At a hearing before a magistrate judge, the parties jointly introduced the reports from petitioner's previous evaluations and stipulated that the Sentencing Guidelines range for the charged offenses was 15 to 21 months. Dr. Lucking testified for the government, recommending that petitioner receive Haldol, an anti-psychotic drug, to restore his competency. Dr. Thompson testified on behalf of petitioner, but he also recommended involuntary medication. Although he preferred the use of a newer anti-psychotic drug, he agreed that both Haldol and the newer drug would be safe and effective. Pet. App. 44; Gov't C.A. Br. 11-14.

The magistrate judge found petitioner incompetent to stand trial and recommended involuntary medication to restore his competency. Pet. App. 6-32. Applying the factors set out in *Sell* v. *United States*, 539 U.S. 166 (2003), the magistrate judge concluded that important governmental interests were at stake because petitioner

was charged with a serious offense; involuntary medication would significantly further the government's interests because the medication was substantially likely to render petitioner competent to stand trial and was substantially unlikely to have side effects that would interfere with his ability to assist counsel in conducting a trial defense; involuntary medication was necessary to further the government's interests because alternative, less-intrusive treatments were unlikely to achieve substantially the same results; and administration of medication was medically appropriate. Pet. App. 19-31. The district court adopted the magistrate judge's recommendation and ordered that petitioner be medicated. *Id.* at 33-36.

3. The court of appeals affirmed. Pet. App. 40-49. The court noted that this Court's decision in *Sell* establishes the factors that a court must consider before authorizing involuntary medication of a defendant to render him competent to stand trial. *Id.* at 45. In *Sell*, the Court held that involuntary medication of an incompetent defendant "facing serious criminal charges" is permissible "if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." 539 U.S. at 179.

The court of appeals determined that all of the *Sell* factors were present in this case. The court noted that petitioner did not contest that the administration of drugs would be medically appropriate. Pet. App. 45-46. The court also concluded that important governmental interests were at stake because petitioner was charged with a serious offense. The court observed that peti-

tioner's Sentencing Guidelines range was 15 to 21 months; that the maximum sentence for petitioner's offenses was ten years of imprisonment; and that, because petitioner had previously threatened the life of a federal officer, a court might find it appropriate, if petitioner were convicted, to impose a sentence exceeding the Guidelines range. *Id.* at 47.

The court of appeals also held that the district court did not clearly err in finding that petitioner's involuntary medication would significantly further the government's interest. Pet. App. 47. The court noted that it was undisputed that other treatment options, such as psychotherapy or education, would be ineffective in restoring petitioner's competency. *Id.* at 48. And it explained that medication would not substantially undermine petitioner's ability to assist in his defense, since "all the doctors who testified at the hearing agree that no matter which drug is used, in the vast majority of cases the side effects can be treated or minimized." *Ibid.*

ARGUMENT

In *Sell* v. *United States*, 539 U.S. 166, 179 (2003), the Court held that the involuntary medication of an incompetent defendant facing "serious criminal charges" may be warranted to restore his competence to stand trial. According to petitioner (Pet. 6-13), lower courts disagree on whether the seriousness of criminal charges should be assessed based on a defendant's likely sentence under the Sentencing Guidelines or on the statutory maximum sentence. Petitioner also asserts (Pet. 14-16) that the district court and the court of appeals erred in concluding that his charges were "serious." Petitioner is incorrect on both points. The case-specific

determination that petitioner faces serious criminal charges does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioner claims (Pet. 7) that "[s]ome confusion seems to have developed among the District and Circuit Courts over the exact meaning of 'serious' in *Sell*." Petitioner cites (Pet. 9-10) *United States* v. *Evans*, 404 F.3d 227, 237 (2005), in which the Fourth Circuit held that "it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes," and *United States* v. *Hernandez-Vasquez*, 513 F.3d 908, 919 (2008), in which the Ninth Circuit "disagree[d] with the Fourth Circuit" and held that "the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness." Petitioner misreads those cases. In fact, *Evans* and *Hernandez-Vasquez* are consistent with each other and with the decision below.

In *Evans*, the court stated that the "focus" should be on the statutory maximum sentence, 404 F.3d at 237, and it rejected the claim that courts "should determine seriousness *solely* by examining" a defendant's probable Sentencing Guidelines range, *id.* at 238 n.7 (emphasis added). In so holding, the court noted that sole reliance on the probable Guidelines range would be "unworkable," "because at this stage in the proceedings, there is no way of accurately predicting what that range will be." *Id.* at 238. The court did not foreclose consideration of the defendant's probable Guidelines range as a factor where, as here, the parties have stipulated to the applicable range.

In *Hernandez-Vasquez*, the court held (in rejection of what it perceived to be the position of the Fourth Cir-

cuit in *Evans*) that the likely Sentencing Guidelines range is the appropriate "starting point" for the analysis of a crime's seriousness. 513 F.3d at 919. The court emphasized that "[i]t is not, however, the only factor that should be considered." *Ibid.* Rather, the court noted that "[b]ecause the sentencing guidelines do not reflect the full universe of relevant circumstances, two indictments alleging crimes with equal likely guideline ranges will not always be equally serious within the meaning of *Sell*." *Ibid.* Thus, the court at least left open that the statutory maximum sentence may also be relevant.

The decision below is consistent with both *Evans* and *Hernandez-Vasquez* because it treated the Sentencing Guidelines range as a "starting point," *Hernandez-Vasquez*, 513 F.3d at 919, but did not "determine seriousness solely by examining [the] probable guidelines range." *Evans*, 404 F.3d at 238 n.7. Instead, the court of appeals examined not only petitioner's likely Guidelines range but also the applicable statutory maximum sentence and other factors—including the circumstances of petitioner's offenses—before concluding that petitioner's charged offenses were serious. Pet. App. 46-47.

The decision of the court of appeals represents a correct application of *Sell*, which calls on courts to "consider the facts of the individual case in evaluating the Government's interest in prosecution." 539 U.S. at 180. It is also consistent with the decisions of other courts of appeals, which have considered both the applicable statutory maximum or minimum and the probable Sentencing Guidelines range in determining whether an offense is "serious" under *Sell*. See, *e.g.*, *United States* v. *Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007) (reasoning that "[w]hether a crime is 'serious' re-

lates to the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which he was charged," and stating, "[w]e consider a maximum sentence of twenty years and a likely guideline sentence of six to eight years sufficient to render the underlying crime 'serious.'"); *United States* v. *Gomes*, 387 F.3d 157, 160 (2d Cir. 2004) (describing "the seriousness of the crime and [the defendant's] perceived dangerousness to society [as] evident from the substantial sentence [the defendant] faces if convicted" and noting that the defendant "faces a possible statutory minimum of fifteen years' imprisonment") (citation omitted), cert. denied, 543 U.S. 1128 (2005). Contrary to petitioner's contention, the lower courts do not apply disparate standards in determining seriousness under *Sell*, but rather follow *Sell*'s directive to look at all the circumstances of "the individual case." 539 U.S. at 180. Those circumstances include not only the likely Guidelines range for the defendant's offense but also any applicable statutory maximum or minimum sentence.

b. Petitioner asserts (Pet. 12-13) that seriousness should be judged based on the defendant's likely sentence under the Sentencing Guidelines, with no consideration of the statutory maximum sentence for the defendant's offense. But *Sell*, which directs courts to consider "the facts of the individual case," 539 U.S. at 180, calls for courts to consider *all* relevant factors. Accordingly, there is no need for this Court to establish a "uniform standard for measuring the 'seriousness' of a crime under *Sell*" (Pet. 12), let alone a standard that requires courts to focus on only one factor. Indeed, because the Guidelines are now advisory, see *Irizarry* v. *United States*, No. 06-7517 (June 12, 2008), slip op.; *Gall* v.

United States, 128 S. Ct. 586 (2007); *United States* v. *Booker*, 543 U.S. 220, 245 (2005), an exclusive focus on the Guidelines range would be particularly inappropriate. In any event, this case is a poor vehicle for considering whether to adopt a rule requiring sole consideration of the likely Guidelines sentence, since, as discussed below, it is far from clear that petitioner could prevail even under such a rule.

2. Petitioner argues (Pet. 14-16) that, "taking into account all of the circumstances" of his case and considering his "likely" sentence under the Sentencing Guidelines, the district court and court of appeals erred in finding that the offenses with which he has been charged are "serious" under *Sell*. Petitioner is incorrect, and further review of that case-specific issue is unwarranted.

Petitioner has been charged with making a false statement in connection with the purchase of a firearm and with illegally possessing a firearm. Each of those offenses carries a statutory maximum sentence of ten years. See 18 U.S.C. 924(a)(2). The conduct that led to petitioner's arrest—possession of a gun on a university campus where a judicial conference was being held, and fleeing from federal officers in his vehicle—created a substantial risk of harm to others. That conduct can appropriately be described as "serious," especially when viewed in light of petitioner's previous arrest for threatening to murder a federal official at a courthouse.

The seriousness of petitioner's offenses is in no way undermined by consideration of his likely Guidelines sentence. Even assuming that petitioner's Guidelines range of 15 to 21 months can be considered low, the range is low because petitioner does not have a criminal history—and petitioner lacks a criminal history only because he avoided federal prosecution in the past by

reason of his incompetence to stand trial. Based on the circumstances surrounding petitioner's offenses, as well as his history of threatening behavior, a sentencing court might reasonably impose a sentence exceeding the Guidelines range. See Pet. App. 47.

Petitioner argues (Pet. 15) that he has already been incarcerated for a period greater than the top of his probable Sentencing Guidelines range. From this he infers that the government does not have important interests at stake in prosecuting him. But as the court of appeals noted, the government's interest is not in having petitioner serve prison time, but in ensuring that he is brought to trial. Pet. App. 49; see *Sell*, 539 U.S. at 180 ("The Government's interest in *bringing to trial* an individual accused of a serious crime is important.") (emphasis added). Moreover, imprisonment is only one component of a sentence. If convicted, petitioner faces a term of supervised release during which the government would be able to monitor him to ensure that he takes his medications and maintains a stable, non-violent lifestyle. The government has an interest in the continued safety of the public in general and federal employees in particular, and a term of supervised release, in conjunction with a term of imprisonment, would further that interest. Supervised release is not available if petitioner is not brought to trial. The courts below therefore reasonably determined that the government has important interests at stake.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
VIJAY SHANKER
Attorney

JUNE 2008